

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 12, 2002 Session

STATE OF TENNESSEE v. ROBERT TAIT

Interlocutory Appeal from the Criminal Court for Shelby County
No. 00-12820 Joseph B. Dailey, Judge

No. W2001-02157-CCA-R9-CD - Filed May 21, 2002

The defendant, Robert Tait, who was charged with one count of driving under the influence, see Tenn. Code Ann. § 55-10-401(a)(1), and one count of driving with a blood alcohol concentration greater than .10%, see Tenn. Code Ann. § 55-10-401(a)(2), sought dismissal of the second count, arguing that it was barred by the statute of limitations. The trial court granted the motion, finding that sections 401(a)(1) and 401(a)(2) were separate crimes, rather than different theories of the same crime. The state was granted permission to appeal under Rule 9 of the Tennessee Rules of Appellate Procedure. Because Tennessee Code Annotated section 55-10-401(a)(1) and (a)(2) provide alternate theories of conviction for the same crime, the judgment of the trial court is reversed and the cause is remanded for trial.

Tenn. R. App. P. 9; Judgment of the Trial Court Reversed and Remanded

GARY R. WADE, P.J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Paul G. Summers, Attorney General & Reporter; Kim R. Helper, Assistant Attorney General; and Steve Jones, Assistant District Attorney General, for the appellant, the State of Tennessee.

N. Craig Brightsen, III, and Terry D. Smart, Memphis, Tennessee, for the appellee, Robert Tait.

OPINION

On July 11, 1999, the defendant was arrested and charged with driving under the influence. Nineteen months later, the defendant was indicted for one count of driving under the influence and one count of driving with a blood alcohol concentration greater than .10% (DUI *per se*). The defendant filed a motion to dismiss the second count of the indictment, arguing that the count was barred by the statute of limitations. The trial court granted the motion and then permitted an interlocutory appeal by the state pursuant to Tennessee Rule of Appellate Procedure 9.

The state argues that the trial court erred by dismissing the second count of the indictment because the defendant waived a preliminary hearing and was bound over on the DUI charge in January of 2000, well within the one-year statute of limitations. The state contends that the provisions of Tennessee Code Annotated sections 55-10-401(a)(1) and (a)(2) constitute only one offense involving two theories of guilt, not two separate and distinct offenses.

Citing State v. Sean W. Conway, No. M2000-01263-CCA-R3-CD (Tenn. Crim. App., at Nashville, May 8, 2001), the defendant argues that Tennessee Code Annotated section 55-10-401 encompasses two separate offenses. He asserts that the trial court correctly dismissed the DUI *per se* charge because it was not commenced within one year of the arrest.

Tennessee Code Annotated section 55-10-401 provides as follows:

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or

(2) The alcohol concentration in such person's blood or breath is ten-hundredths of one percent (.10%) or more.

Tenn. Code Ann. § 55-10-401(a).

In Conway, a panel of this court held that because DUI and DUI *per se* contain different elements, an acquittal of either would not necessarily mean that the state could not establish the elements of the other. Without establishing whether DUI and DUI *per se* are separate and distinct offenses, the panel ruled that retrial for DUI *per se* after an acquittal for the offense of DUI would not violate double jeopardy.

In State v. Howard, 30 S.W.3d 271 (Tenn. 2000), the defendant was charged with premeditated murder and felony murder but convicted of second degree murder and felony murder. Our supreme court, after reversing the felony murder conviction on other grounds, held that double jeopardy did not bar retrial for the offense of felony murder even though the jury had acquitted the defendant of first degree premeditated murder. Further, the high court found that premeditated murder and felony murder were not separate offenses, but different theories of guilt for the crime of first degree murder. In consequence, separate convictions for both felony murder and premeditated murder based upon the same occurrence must be merged. Similarly, “[a] jury verdict convicting a defendant of ordinary DUI under Tennessee Code Annotated § 55-10-401(a)(1) and DUI with a blood alcohol content of .10% or higher under Tennessee Code Annotated § 55-10-401(a)(2) does not constitute separate convictions and only authorizes one single judgment of conviction.” State v. Delfro Willis, No. 02C01-9810-CC-00336 (Tenn. Crim. App., at Jackson, July 12, 1999) (citing

State v. Powers, No. 02C01-9808-CC-00242 (Tenn. Crim. App., at Jackson, April 19, 1999)); see also State v. Clark, 67 S.W.3d 73, 75 (Tenn. Crim. App. 2001) (approving of the merger of DUI convictions under sections 401(a)(1) and (a)(2)); State v. Steve Clark, No. M2000-03148-CCA-R3-CD (Tenn. Crim. App., at Nashville, Sept. 19, 2001) (noting merger of separate DUI convictions with approval); State v. Jonathan Aaron Baker, No. M2000-00320-CCA-R3-CD (Tenn. Crim. App., at Nashville, April 30, 2001); State v. Leonard Huston Prater, Jr., No. 01C01-9710-CC-00499 (Tenn. Crim. App., at Nashville, Feb. 16, 1999). In Conway, the panel of this court compared the merging of DUI convictions under Tennessee Code Annotated section 55-10-401 to the merging of premeditated and felony murder convictions. See Conway; see also Willis, slip op. at 5. In our view, Tennessee Code Annotated section 55-10-401 encompasses only one crime, DUI, with separate theories of conviction.

Our next inquiry is whether the prosecution was commenced within the statute of limitations. Tennessee Code Annotated section 40-2-102 provides that “[e]xcept as provided in § 62-18-120(g) and subsection (b) of this section, all prosecutions for misdemeanors shall be commenced within twelve (12) months next after the offense has been committed.” Tenn. Code Ann. § 40-2-102(a). Tennessee Code Annotated section 40-2-104 provides that a prosecution is commenced by the following:

finding an indictment or presentment, the issuing of a warrant, binding over the offender, by the filing of an information as provided for in chapter 3 of this title, or by making an appearance in person or through counsel in general sessions or any municipal court for the purpose of continuing the matter or any other appearance in either court for any purpose involving the offense.

Tenn. Code Ann. § 40-2-104.

In January of 2000, well within the statute of limitations, the defendant waived his right to a preliminary hearing on the DUI charge and the case was bound over to the grand jury. Because count two is merely an alternative theory of guilt and must be merged with count one in the event of conviction, it is not barred by the one-year statute of limitations.

Accordingly, the judgment of the trial court is reversed and the cause is remanded for trial. Costs are adjudged to the defendant.

GARY R. WADE, PRESIDING JUDGE